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No. 58 [redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1968

EDWARD SOMERVILLE,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Petition For A Writ of Certiorari To The Appellate Court of Illinois, First Judicial District.

PETITION FOR A WRIT OF CERTIORARI

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NO.

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On Petition For A Writ of Certiorari To The Appellate Court of Illinois, First Judicial District.

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Edward Somerville, hereby petitions this Honorable Court for a writ of certiorari to review the judgment of the Appellate Court of Illinois, First Judicial District, which affirmed the judgment of conviction of armed robbery, entered by the Circuit Court of Cook County, County Department-Criminal Division.

Opinion Below

The abstract of the opinion of the Appellate Court of Illinois is reported at 88 Ill.App.2d 134, 231 N.E.2d 701. The full opinion is contained in Appendix A, infra.

Jurisdiction

The judgment sought to be reviewed was entered on October 20, 1967. A timely petition to the Supreme Court of Illinois for leave to appeal was denied on Jan. 17, 1968. The statutory provision believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari is Title 28, United States Code, Section 1257(3).

Question presented for review

The Petitioner was denied his right to a fair trial and due process of law because of perjury committed by the chief witness for the prosecution who lied when he stated that he did not expect leniency as a result of his testifying for the prosecution; and by the prosecution deliberately creating the false impression that the witness was not promised leniency.

Statement of the case

The petitioner was convicted of the crime of armed robbery in the Circuit Court of Cook County, Illinois. He was sentenced to the Illinois State Penitentiary for a term of not less than ten years nor more than twenty years. While his appeal to the Appellate Court of Illinois was pending, he filed a motion for new trial in the trial court. That motion is as follows (Add. Ab. 1-4):

Motion for New Trial

Comes now Edward Somerville, defendant, by his attorney, Julius Lucius Echeles, and respectfully moves the court for a new trial on the grounds of newly discovered evidence, and states as follows:

1. That he was convicted of the crime of robbery before a jury, sentenced to ten to twenty years, in a trial which commenced on November 16, 1965 (Tr. of Pr. 1). His conviction was the product of testimony by one, Leon K. Arnold, which testimony was uncorroborated as to the fact of defendant's participation in the robbery. Arnold testified he was an accomplice robber with defendant (Tr. of Pr. 36-160).

2. Defendant took the stand, testified, and denied the accusation of Arnold (Tr. of Pr. 290-347).

3. Accordingly, the issue at the trial was the credibility of Arnold as against the credibility of defendant. Arnold had been indicted for the offense in March, 1964, and as of trial time, November 16, 1965, Arnold had not pled guilty, nor was there any other disposition made of his case—even as of the date of this motion. On direct testimony when he was being examined by the prosecutor, the following occurred:

"Mr. Tuite (Assistant State's Attorney): Q. Mr. Arnold, have you ever been convicted of any felony in this state or any state in this country?

The Witness: A. No, sir.

Q. And prior to your giving testimony in this case, have there been any promises made to you by the State's Attorney's office or by any police force in this county?

A. No, sir." (Tr. of Pr. 80-81).

4. Arnold testified subsequently in the matters relating to the instant case in a trial commencing March 7, 1966, in *People* v. *Donald Somerville and Marjorie Kullerstrand,* indictment No. 65-3017, (presently on appeal to the Appellate Court of Illinois, First District, No. 51415). In that case, however, during cross-examination regarding the same matters to which Arnold had testified in the trial against the instant defendant, the following occurred:

"Q. Did the Sheriff's police tell you that you would probably benefit by telling the truth?

A. I expected leniency if that's what you mean.

Q. You expected leniency?

A. Yes, sir.

Q. From the Sheriff's police?

A. Yes, sir.

Q. You expected the Sheriff's police to be able to help you, is that right?

A. Yes, sir.

Q. And they told you to come to the State's Attorney's office?

A. Yes, sir.

Q. And is that the first time you met Mr. Tuite?

A. Yes, sir." (Tr. of Pr. 137).

* * * *

"Q. And did Mr. Tuite tell you that it would benefit you to tell the truth?

A. I don't understand what you mean?

Q. You are having difficulty?

A. Yes.

Q. You wanted to help yourself, is that right?

A. Yes.

Q. Did you express your feelings that you wanted to help yourself to Mr. Tuite?

A. Yes.

Q. Did he say that he could help you?

A. *He said I could probably get leniency.*

Q. He told you, you would get leniency, is that right, and you don't expect leniency, is that right?

A. No, I don't expect leniency, I hope for it." (Tr. of Pr. 138).

5. In *People* v. *Hoskins*, 25 Ill. 2d 333, 185 N.E. 2d 214 (1962), the Supreme Court stated (185 N.E. 2d at 216):

"Where there has been a knowing use of perjured testimony, that fact will not ordinarily appear from the record made at the trial. The relevant evidence is, therefore, put before a trial court in some form of post trial proceeding. (See e.g. *Napue* v. *People of the State of Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.ed. 2d 1217 (post-conviction hearing); *Kyle* v. *United States* (Second Cir. 1961) 297 F.2d 507 (motion under 28 U.S.C.A. 2255); *United States ex rel. Hamilton* v. *Maroney* (W.D. Pa. 1960) 184 F. Supp. 721 (habeas corpus); *People* v. *Savvides* (1956) 1

N.Y. 2d 554, 154 N.Y.S. 2d 885, 136 N.E. 2d 853 (motion for a new trial) . . . It is hard to see how the two contradictory statements upon which the defendant relies can be so reconciled as to avoid the force of his contention."

6. Accordingly, because the prosecutor knew of the perjured testimony of Arnold at the time it was presented in the case at bar, this court should grant a hearing, and upon such hearing, receive evidence and thereupon order a new trial.

In response to the motion for new trial, the State filed a motion to dismiss which reads as follows (Add. Ab. 4-5):

Now comes John J. Stamos, State's Attorney of Cook County, by Matthew J. Moran, Assistant State's Attorney and moves to dismiss defendant's Motion for a new trial for the following reasons:

1. The defendant was convicted of robbery in November 1965, and a review of that conviction is now pending before the Appellate Court of Illinois, First District. Jurisdiction over this case is therefore in the Appellate Court and not in the trial court.

2. The Appellate Court of Illinois, First District, has denied the defendant's Motion to stay all appellate proceedings so that he may seek relief from the trial court.

3. The defendant is free on an appeal bond and does not fulfill the statutory requirements for post-conviction relief—Illinois Revised Statutes 1965, Chapter 38, Section 122-1.

Wherefore, the People pray this Honorable Court dismiss the defendant's Motion.

The petitioner thereupon answered the motion to dismiss (Add. Ab. 5-6):

1. Athough defendant's appeal from his conviction in this court is presently pending before the Appellate Court, that court cannot entertain motions for a new trial based on matters discovered after the trial in the instant cause.

2. Although the Appellate Court refused to stay all appellate proceedings pending application for relief from the trial court, it did not state—implicitly or explicitly—that defendant could not seek relief in the trial court.

3. Defendant does not seek relief by way of post-conviction. He seeks relief by way of motion for a new trial on the grounds of new evidence not available to him at the time of his trial, to-wit: the perjury of the State's chief witness, such perjury being known to the prosecutor. Section 122-1, Chapter 38, Illinois Revised Statutes, 1965, referred to by the State in paragraph 3 of its Motion to Dismiss, relates only to Post-Conviction hearings. It does not relate to new trial motions based on newly discovered evidence. In any event, a proceeding to attack a conviction on constitutional grounds may be made at any time, before a defendant commences serving of his sentence, during the serving of his sentence or even after the sentence has been served completely. *United States* v. *Morgan,* 346 U.S. 502, 98 L.ed.2d 248.

The trial court denied the motion for new trial (Add. Ab. 6) and the Appellate Court considered the proposition raised in the motion for new trial and disposed of it in the following manner:

"Defendant is in error in attempting to equate the words "He said I could probably get leniency" with the making of a definite promise. It is clear that leniency was a mere expectation on Arnold's part; there is not one word in the above testimony of any promise having been made that Arnold would get leniency if he testified for the State. Furthermore, there is no indication that the conversation with regard to leniency between Arnold and the prosecuting attorney did not occur within the five months between the trial in the instant cause and the trial from which the above testimony was excerpted. It should also be noted that the question of leniency goes to the credibility of Arnold as a witness and that the jury was presented with a great deal of evidence that Arnold testified as he did due to a grudge he held against defendant; the jury nevertheless chose to believe Arnold's testimony hich was corroborated by the other witnesses for the State.

"The cases of Napue v. Illinois, 360 U.S. 264, and People v. Agnello, 35 Ill. 2d 611, so heavily relied upon by defendant in support of his position are not in point. In each of these cases the witness testified there had been no promise made to him by the State in consideration for his evidence, whereas there had in fact been a promise of consideration made and the prosecuting attorney knew of the promise during the questioning. This is not the situation in the instant cause."

Reasons for Granting Writ

The prosecution deliberately created the false impression that the chief witness for the prosecution, one Leon K. Arnold, an accomplice witness, was not promised nor had expectation of leniency because of his giving testimony favorable to the prosecution.

On direct examination by the prosecutor, the witness Arnold was questioned as follows by Mr. Tuite, the assistant state's attorney (additional Abs. 2):

> Mr. Tuite: Q. Mr. Arnold, have you ever been convicted of any felony in this State or any State in this country?
>
> The Witness: A. No, sir.
>
> Q. And prior to your giving testimony in this case, have there been any promises made to you by the State's Attorney's office or by any police force in this county?
>
> A. No, sir.

In a trial of a companion case, Arnold again testified and this time was questioned and gave the following answers (additional Abs. 3):

> Q. And did Mr. Tuite tell you that it would benefit you to tell the truth?
>
> A. I don't understand what you mean.
>
> Q. You are having difficulty?
>
> A. Yes.
>
> Q. You wanted to help yourself, is that right?
>
> A. Yes.
>
> Q. Did you express your feelings that you wanted to help yourself to Mr. Tuite?
>
> A. Yes.

Q. Did he say that he could help you?
A. He said I could probably get leniency.
Q. He told you, you would get leniency, is that right, and you expect leniency, is that right?
A. No. I don't expect leniency, I hope for it.

We must also here made note of one aspect of the Appellate Court's disposition of this question. The Court indicated that there was no showing as to when the conversation between Tuite and Arnold took place, and therefore, the promise might have come since the trial of Edward Somerville. This must be patently false because the record is clear that the promise was made the first time Arnold met Tuite which would have had to have been before the trial of Edward Somerville.

It is obvious that the prosecutor's questions to Arnold in the instant case were meant to create the impression that Arnold had had no conversations with anyone in the State's Attorney's office or with any police officer in which the matter of leniency was discussed. To the contrary, however, there had been conversations in which the very Assistant State's Attorney who questioned Arnold had told him that he could probably get leniency.

Thus the case involves a question which goes even beyond *Napue* v. *Illinois*, 360 U.S. 264, in which it was held that a conviction must fall when the prosecution, although not soliciting false evidence, allows it to go uncorrected when it appears. There is here involved the proposition announced by Justice Brennan and concurred in by Chief Justice Warren and Justice Douglas in the case of *Giles* v. *Maryland*, 386 U.S. 66, 87 S. Ct. 793, that there is a constitutional duty on the part of the prosecution to disclose all evidence admissible and useful to the defense.

The proposition referred to above from the plurality opinion in Giles was admittedly never adopted by the Supreme Court and only accepted in the concurring opinion of Mr. Justice Fortas, 386 U.S. 66, 87 S.Ct. 793, 808, 809. Justice Fortas said:

> I do not agree that the State may be excused from its duty to disclose material facts known to it prior to trial solely because of a conclusion that it would not be admissible at trial. The State's obligation is not to convict, but to see that, so far as possible, truth emerges. This is also the ultimate statement of its responsibility to provide a fair trial under the Due Process Clause of the Fourteenth Amendment. No respectable interest of the State is served by its concealment of information which is material, generously conceived, to the case, including all possible defenses.

The action of the prosecution is barred even by the rules discussed in Justice Harlan's dissent in the *Giles* case, 386 U.S. 66, 87 S.Ct. 793, 811. There he analyzed prior cases dealing with the State's duty to disclose evidence:

> * * * The evidence with which the plurality is concerned therefore cannot 'reasonably be considered admissible,' *Griffin* v. *United States,* 87 U.S. App. B.C. 172, 175, 83 F.2d 990, 993, under the law of Maryland. Far more important from a Federal standpoint, evidence of Foster's relations with the girl, even if admissible, could not have been substantially relevant to the principal factual issues at the trial. Its omission did not discolor the meaning of controlling facts, as did the episode involved in *Alcorta* v. *State of Texas,* 355 U.S. 23, 78 S.Ct. 103, 2 L.Ed. 2d 9; nor did it measurably strengthen a witness' credibility, as did the one involved in *Napue* v. *People of the State of Illinois,* 360 U.S. 264, 79 S.Ct. 1173.

Paraphrasing Justice Harlan's dissent, evidence in this case that Tuite had told Arnold that he (Arnold), "could probably get leniency." was admissible it did discolor the meaning of controlling facts, *i.e.* Arnold's credibility; and its omission measurably strenthened the witness Arnold's credibility. Furthermore, there is no question that such evidence was admissible.

Under all of these circumstances, the defendant-petitioner was denied due process of law because of the State's withholding relevant evidence which would have had great bearing upon the question of the defendant's guilt.

Conclusion

For the above and foregoing reasons a Writ of Certiorari ought to issue to review the judgment of the Appellate Court of Illinois, First Judicial District, entered in this case.

Respectfully submitted,

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APPENDIX A

Opinion of Appellate Court

MR. JUSTICE BURKE *Delivered the Opinion of the Court:*

Edward Somerville, hereinafter referred to as defendant, Paul Langusch, Robert Somerville, Gail Somerville, Douglas Aldridge and Leon Arnold were indicted for the crime of armed robbery. (Robert Somerville, Gail Somerville and Paul Langusch were previously tried and found guilty, and their convictions were upheld on appeal. See People v. Somerville, 71 Ill. App. 2d 381.) Defendant was tried alone at a jury trial, was found guilty and was sentenced to a term of ten to twenty years in the State penitentiary. On this appeal he maintains that he was denied a fair trial on the grounds that the State permitted perjured testimony to be heard by the jury, that the trial court improperly allowed a defense witness to be impeached by means of a felony conviction which was too remote in time, and that the same defense witness was improperly impeached by means of a prior misdemeanor conviction.

Robert Olszewski, manager of the Zayre Department Store in Bridgeview, Illinois, testified that on March 23, 1963, robbers took some $22,000 from him at the store and escaped with $13,000 thereof. About 10:00 P.M. on that day Olszewski and assistant store manager Jerry Hayer were in the cash office of the store when Olszewski heard a commotion in the main part of the store. He looked into the store proper and observed an armed man whose head was covered by a hood. Olszewski and Hayer were told to lie on the floor and to remain quiet. The hooded man left and shortly thereafter Olszewski heard gunshots and the crashing of glass. In the store Olszewski found the jani-

tor had been shot. Olszewski recovered a cloth bag in the vestibule of the store containing some of the money taken in the robbery. Next to the bag was found a shoe, and outside the store another shoe was found. Hoods were found in and near the store. Approximately one mile from the store a 1963 dark-colored, four-door Chevrolet automobile was found.

Leon Arnold, the State's principal witness, stated that he was under indictment for the robbery in question. He testified that on the evening of March 23, 1963, he was drinking in various taverns with Douglas Aldridge and saw defendant in one of the taverns. Defendant told Arnold and Aldridge that he "had something good" and that it related to the Zayre Department Store. The three men drove in defendant's automobile to a house in the Blue Island Area where they met with defendant's two brothers, Robert and Gail Somerville, and Paul Langusch. Robert Somerville was a security guard at the Zayre Department Store and Gail Somerville outlined the plan for the robbery of the store. Paul Langusch was told to "pick up a hot car" and left the house.

Arnold testified that Gail Somerville was to drive Robert Somerville's pick-up truck to the department store for use as one of the "get-away cars." Arnold, Aldridge and defendant were to enter the store before it closed and wait in a storeroom until they received a prearranged signal from Langusch. Langusch, parked in the stolen automobile in front of the store, would let the men inside the store know by way of a walkie-talkie when the cashiers had left the store and when the lights were put out. After the robbery, the men were to make their escape in the stolen automobile, which was then to be abandoned, and Gail Somerville was to pick up the men in the truck where they were to hide under mattresses in the rear of the truck.

The men proceeded to the Zayre Department Store, Gail Somerville in the pick-up truck, Langusch in a stolen dark-colored, four-door 1963 Chevrolet, and the rest of the men in defendant's automobile driven by Robert Somerville. Pursuant to the plan, Langusch remained outside the store in the stolen automobile, while defendant, Arnold and Aldridge entered the store, proceeded to the storeroom, donned hoods which they had made for the occasion, and waited for the signal from Langusch.

Arnold testified that after a while, when they had received no signal from Langusch, the three men proceeded into the store where they encountered the janitor. A fight ensued, the janitor was "getting the better" of Arnold and Aldridge, and one of the other men shot him. The money was taken and the three men fled.

Arnold testified he discarded his hood and that he had only one shoe on which he likewise discarded. Both of these items were recovered in the store and were identified by Arnold at the trial as belonging to him. Arnold ran from the store and finally stopped in a prairie on 95th Street near the Starlite drive-in theater where he unexpectedly met Aldridge. Aldridge was also missing a shoe, which was found near the department store and which Arnold identified at the trial as belonging to Aldridge. Aldridge gave Arnold some of the stolen money which he had in a cloth bag and in his pocket and the two men began walking. When they neared the Southwest Highway, Arnold made a telephone call and the two men were picked up by Gail Somerville about 8:00 on the morning of March 24th.

Arnold, Aldridge and Gail Somerville drove to an unidentified woman's house on 99th Street where they met with Langusch, Robert Somerville, defendant, and defen-

dant's third brother, Donald Somerville, a Chicago policeman. While the woman doctored Arnold and Aldridge's feet, the money from the robbery was counted and split between the participants of the robbery. The men each paid the woman $50 and left.

In response to questioning by the prosecuting attorney, Arnold stated that he was never convicted of a felony, that an indictment for aggravated battery was pending against him for a matter occurring after the robbery in question, that he was made no promises of leniency by the State's Attorney's office nor by any other police agency in return for his testimony and that the reason he was testifying against his confederates was because he did not want to go to the penitentiary.

Mrs. Beatrice Rahn testified that she lived Kitty-corner from the Somerville residence in Worth Township. She stated that the Somervilles owned different trucks at various times, that she saw a truck in the Somerville driveway on the afternoon of March 23, 1963, and that Gail Somerville and Paul Langusch were near the truck that day. The witness further testified that she noticed the truck leave the Somerville driveway about 9:30 P.M. on March 23rd because the truck's lights shined into her front window as it pulled out of the driveway and that she heard it return about 11:00 that same night. Mrs. Rahn also observed two mattresses on the rear of the truck the following morning.

Mrs. Judy Stark testified that she was employed at the Zayre Department Store and that when she left the store about 10:10 P.M. on March 23, 1963, she walked toward a dark-colored 1963 Chevrolet automobile which she thought belonged to Jerry Hayer and observed a person sitting in the automobile who resembled Robert Olszewski.

She observed the person from a few feet away and the person turned away. Mrs. Stark later identified that person as Paul Langusch from numerous photographs shown to her and again in police line-up in February of 1964.

Officer John Browne testified that he arrested Aldridge on April 29, 1963, in Blue Island and that at that time he recovered a walkie-talkie from Aldridge's automobile, previously identified at the trial by Arnold as one of the walkie-talkies used in the robbery. The officer further stated that Arnold and Gale Somerville were also arrested at that time. FBI agent Robert Matheson testified he arrested defendant on January 26, 1965, in a motel in Los Angeles, California, living under the name of James Baker.

A defense of alibi was raised by defendant. He also attempted to show by evidence that Leon Arnold testified as he did because of a grudge Arnold held against defendant for an incident occurring in June of 1963. Defendant's alibi witnesses, John Johnson, Thomas Smith and Mrs. Delores Smith, testified substantially that defendant and they were in a restaurant in Oak Forest, Illinois, at the time the robbery was being committed, and that defendant did not leave the restaurant until 11:30 P.M. or later on the date in question.

Donald Allen Somerville, defendant's father, testified that on June 1, 1963, he observed Leon Arnold outside the home of defendant's brother, Donald, accusing defendant of having taken Arnold's wife to a party. The witness testified there was a scuffle, that Arnold was struck in the face and that Arnold told defendant, "I will get even with you if it takes the rest of my life." Mr. Somerville testifield further that he saw defendant outside a courtroom in Florida on April 29, 1964, and that defendant had stated that the judge freed him. The witness stated that Leon

Arnold, who was also present, then stated to a nearby deputy sheriff, "What the hell kind of law do you have here? I came all the way, 1,500 miles to get even with that guy and he was turned free."

On cross-examination of the witness the prosecuting attorney brought out that the witness was convicted in 1945 of burglary, that he pleaded guilty to the charge and that he received a sentence of 5 years probation; he further testified he also received 90 days in the county jail for breaking a window.

Mrs. Mary Somerville, defendant's mother, testified she overheard Leon Arnold say to a Fort Lauderdale sheriff, "What the hell. I come all the way down here to get that guy because he's going—and the judge wouldn't free—and the judge freed the guy."

Defendant testified in his own behalf and denied having taken any part in the Zayre Department Store robbery. He testified among other things, that on June 1, 1963, he was at a party at his brother's house when Leon Arnold drove up in an automobile and shouted obscene words at him. Arnold was struck in the face and threatened to get even with defendant. Defendant further testified he moved to Florida in 1964 and later learned that he was under indictment for the Zayre Department Store robbery and that he went to court in Florida in regard to the matter. After having received permission from the judge to leave and upon leaving the courthouse, he overheard Arnold state to a sheriff's police officer that he (Arnold) travelled 1,500 miles to get even with defendant and that defendant was freed. Defendant further testified that he then moved to California and lived under an assumed name until he was arrested and brought back to Illinois.

Leon Arnold testified in rebuttal and denied having had a fight with defendant. Mary Campbell, Arnold's common-in-law wife, testified that she did not attend a party with defendant and further denied knowing defendant.

Defendant's first contention, that he was convicted as the result of perjured testimony, is without merit. The contention is based upon the fact that Leon Arnold testified at the trial in the instant cause that he was given no promises by the State's Attorney's office or any other police agency, whereas at a trial involving Donald Somerville and Marjorie Kullerstrand some five months later, when testifying to matters relating to the instant cause in response to questions propounded by the same attorney who prosecuted the instant cause, the following testimony was elicited from Arnold:

"Q. Did the sheriff's police tell you that you would probably benefit by telling the truth?

A. I expected leniency if that's what you mean.

Q. You expected leniency?

A. Yes, sir.

Q. From the sheriff's police?

A. Yes, sir.

Q. You expected the sheriff's police to be able to help you, is that right?

A. Yes, sir.

Q. And he told you to come to the State's Attorney's office?

A. Yes, sir.

Q. And is that the first time you met Mr. Tuite (prosecuting attorney)?

A. Yes, sir."

• • • •

"Q. And did Mr. Tuite tell you that it would benefit you to tell the truth?

A. I don't understand what you mean.

Q. You are having difficulty?

A. Yes.

Q. Did you express your feelings that you wanted to help yourself to Mr. Tuite?

A. Yes.

Q. Did he say he could help you?

A. He said I could probably get leniency.

Q. He told you, you would get leniency, is that right, and you expect leniency, is that right?

A. No, I don't expect leniency, I hope for it."

Defendant is in error in attempting to equate the words "He said I could probably get leniency" with the making of a definite promise. It is clear that leniency was a mere expectation on Arnold's part; there is not one word in the above testimony of any promise having been made that Arnold would get leniency if he testified for the State. Furthermore, there is no indication that the conversation with regard to leniency between Arnold and the prosecuting attorney did not occur within the five months between the trial in the instant cause and the trial from which the above testimony was excerpted. It should also be noted that the question of leniency goes to the credibility of Arnold as a witness and that the jury was presented with a great deal of evidence that Arnold testified as he did due to a grudge he held against defendant; the jury nevertheless chose to believe Arnold's testimony which was corroborated by the other witnesses for the State.

The case of Napue v. Illinois, 360 U.S. 264, and People v. Agnello, 35 Ill. 2d 611, so heavily relied upon by defendant in support of this position are not in point. In each

of these cases the witness testified there had been no promise made to him by the State in consideration for his evidence, whereas there had in fact been a promise of consideration made and the prosecuting attorney knew of the promise during the questioning. This is not the situation in the instant cause.

Defendant next contends that Donald Allen Somerville was impeached by means of a felony conviction too remote in time to have any bearing on his truth and veracity. In support of this position he cites the case of People v. Henneman, 323 Ill. App. 124, which holds that a conviction for a crime which occurred when the witness was 18 years of age some 21 years prior to the time the conviction was used to impeach the witness was too remote under the circumstances of the case. In view of the later cases of People v. Buford, 396 Ill. 158, which holds that the statute fixes no limitation as to the time when a prior conviction may be utilized to affect the credibility of a witness, and People v. Brown, 69 Ill. App. 2d 212, which comments on both the Buford and Henneman cases and which also holds that the statute prescribes no such time limit defendant's contention in this regard cannot be sustained.

Defendant's final contention is that the same witness, Donald Allen Somerville, was improperly impeached by way of evidence of a conviction of a misdemeanor in the form of a conviction for breaking a window and a sentence therefore of 90 days in the county jail. This contention is likewise untenable. In the first place, the testimony elicited from the witness in this regard immediately followed his testimony concerning the conviction for burglary, to which charge he pleaded guilty and for which he received 5 years probation. The prosecuting attorney then asked, "Aside from receiving five years' probation, you also received

time in the County Jail?" The witness answered, "Ninety days for breaking a window." It is difficult to determine whether the 90 days sentence was imposed as a part of the burglary judgment, or whether it related to some other misdemeanor offense. The evidence pertaining to the breaking of the window was cumulative and its admission into evidence was not prejudicial error. Although this matter is advanced as error on this appeal, no objection was raised below with regard to the admission of the evidence relating to the felony conviction or the evidence about the 90 day sentence. Defendant cannot now be heard to complain in this regard.

We do not find any reversible error. Therefore, the judgment is affirmed.

AFFIRMED.

LYONS, *P.J.*, and BRYANT, *J.* concur.

APPENDIX B

Judgment Order of the Appellate Court of Illinois

The judgment of the Circuit Court of Cook County is affirmed.

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUN 22 1968
JOHN F. DAVIS, CLERK

IN THE

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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People v. Lewis, 22 Ill. 2d 68, 174 N.E. 2d 197 (1961)	4
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People v. Myers, 35 Ill. 2d 311, 220 N.E. 2d 297 cert. den. 385 U.S. 1019	4

Statutes

Illinois Revised Statutes:	
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Chapter 110, Sec. 72	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NO. 1320

EDWARD SOMERVILLE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ of Certiorari To The Appellate Court of Illinois, First Judicial District.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED

Whether the statement of a witness that he was testifying because he expected leniency and did not want to go to the penitentiary but that he received no promises prior to testifying is perjurious in light of his testimony given five months later that the prosecutor told him that he could probably get leniency, but did not tell him that he would get leniency?

Whether the issue of knowing use of perjury can be raised when no evidentiary hearing was had under one of two available Illinois procedures?

REASON FOR DENYING THE WRIT

The Petitioner's assertion that the State knowingly used perjury is patently without foundation. He points to a single statement of an accomplice witness and concludes that it stands as proof of a concealed agreement which was made between the State and the witness whereby a promise of leniency was tendered.

The People submit that Petitioner has made unsubstantiated allegations which do not in any manner elevate themselves to the level of a showing of the knowing use of perjured testimony by the State. The record is manifestly clear that Leon K. Arnold, the accomplice witness, never testified that he was promised anything by the State's Attorney's Office or any other law enforcement agency of Illinois nor does the testimony in question lend itself to any such inference. It is without question that the full extent of the witness's interest in testifying was revealed to the trier of fact—the jury.

(Cross-Examination of Leon K. Arnold by John G. Cogan, Attorney for Edward Somerville).

Q. As far as you know the State's Attorney could forget about your case, isn't that right?

A. No sir.

Q. Are you hoping that he might do it?

A. He can't do that, I don't think.

Q. Are you hoping that he might do that?

A. As far as I am concerned, I don't think it is left up to the State's Attorney; it is left up to the Judge.

Q. Well you know what a nolle prosse is, don't you, that is when the State says, "I don't want to prosecute". Tuite can do that for you can't he?

A. I don't know.

Q. Ahe you hoping that he might do that?

A. It never entered my mind that he would do that.

Q. Well, you are testifying here against Edward Somerville, aren't you?

A. Yes, sir.

Q. And you are doing that for what purpose?

A. Because I expected leniency.

Q. How much leniency do you expect?

A. All I can get.

Q. Probation, for example?

A. I don't know.

Q. No prosecution, for example?

A. I don't know, sir.

Q. You don't want to go to the penitentiary do you?

A. No, sir.

Q. And that is why you are testifying, isn't it?

A. Yes, sir. (Abst. 8; Rec. 130-131).

The above quoted testimony in the Edward Somerville trial is no way contradictory to Leon Arnold's subsequent testimony in the trial of Donald Somerville and Marjorie Kullerstrand which testimony is set out in the Petition for Certiorari.

No factor bearing upon the issue of the witness's credibility was concealed by the People from the jury. The extensive cross-examination by defense counsel clearly exposed the witness's reason for testifying on behalf of the State—He did not want to go to the penitentiary; he ex-

pected leniency. The motive behind Arnold's testimony was before the jury. It cannot be seriously argued that the jury was in any manner impaired in ascertaining Arnold's credibility.

There is no marked variance substantiated in the record. The statement that the prosecutor said "he [the witness] could probably get leniency" cannot be equated with a commitment to that end. Mention of the probability of leniency does not in and of itself amount to a promise.

The record produced below is bare of any showing of concealment or knowing use of perjury. What is apparent is a clear lack of prejudice to the Petitioner.

A further reason for denying the writ is the state of the record in this case. The basis for the charge of concealment or knowing use of perjury is the statement of a witness at a trial taking place five months after the trial of this case. That statement in itself does not establish perjury. And, most significantly, the prosecution was never in a position to affirm, deny or clarify the statement supposedly made by a prosecutor. The issue was raised on a motion for new trial filed long after the proper time for the filing of such motions. Ill. Rev. Stat. 1963, Ch. 38, Sec. 116-1. The motion was filed after an appeal had been taken and the trial court had no jurisdiction. People v. Myers, 35 Ill. 2d 311, 337, 220 N.E. 2d 297, 312 cert. denied 385 U.S. 1019 (1966). The Petitioner ignored two proper remedies for the adjudication of claims of perjury by means of evidentiary hearings: a petition under section 72 of the Civil Practice Act (Ill. Rev. Stat., Ch. 110, Sec. 72; People v. Lewis, 22 Ill. 2d 68, 174 N.E. 2d 197 (1961)) or a post-conviction petition (Ill. Rev. Stat., Ch. 38, Art. 122; People v. Macias, 39 Ill. 2d 208, 211-12, 234 N.E. 2d 783, 786 (1968). In short the Petitioner has,

with admirable skill, created a record by making allegations in an improper proceeding where the court had no jurisdiction and the People had no opportunity to answer on the merits.

CONCLUSION

The People of the State of Illinois respectfully request that the Writ of Certiorari be denied.

Respectfully submitted,

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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The petition for a writ of certiorari disclosed a discrepancy between the testimony of the witness Arnold given at the proceedings against petitioner and at the subsequent trial of Donald Somerville and Marjorie Kullerstrand. Respondent, in its brief does not dispute the existence of this conflicting testimony. Instead it merely quotes additional evidence offered by Arnold at petitioner's trial, and argues that this abstracted testimony is not inconsistent with that given at the later cause.

Admittedly, much of what Arnold said at one proceeding is entirely consistent with his testimony at the other. The fact remains, however, that prior to petitioner's trial, the prosecutor had told this witness he could probably get leniency; yet on the stand Arnold denied knowledge of any such promise. Most importantly, the very same State's Attorney who had tendered the promise remained silent in the face of the perjury.

This factual situation closely parallels the one facing this Court in *Napue* v. *Illinois,* 360 U.S. 264 (1959). There, it was held that the failure of the prosecutor to correct the testimony of a witness which he knew to be false denied the petitioner due process of law in violation of the Fourteenth Amendment. On the same grounds, this petitioner's conviction must be overturned.

Respectfully submitted,

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